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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95 *et al.*,
Petitioners,
v.
JESSE A. VAIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

This brief is filed, with the consent of all parties, on behalf of the American Association of University Professors ("AAUP") as *amicus curiae* in support of the respondent.

INTEREST OF THE *AMICUS*

The AAUP is a membership organization of 65,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the nation's oldest and largest enterprise dedicated exclusively to the interests of professional scholars in all academic disciplines.

One of the AAUP's principal tasks, frequently undertaken in collaboration with other higher education organizations, is the formulation of national standards for

the protection of academic freedom and tenure at American colleges and universities. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by the AAUP and the Association of American Colleges and subsequently endorsed by over one hundred educational organizations and learned societies. Courts throughout the country, including this Court, frequently refer to AAUP policy statements in resolving disputes over the terms and conditions of faculty employment.[1]

From its founding, the AAUP's commitment to the protection of academic freedom has encompassed not only the substantive rights and liberties of faculty members, but also the procedures used in the termination or nonrenewal of academic appointments. Through statements of general applicability and investigations of particular personnel matters, the AAUP has declared its concern for fair and adequate procedures and its conviction that academic freedom cannot flourish unless such procedures are observed by college and university officials and governing boards.

Broad procedural, as well as substantive, guidelines protective of tenure as a principal safeguard of academic freedom are contained in the 1940 *Statement of Principles*. Derivative procedural requisites are set forth in the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, which, like the 1940 *Statement*, was jointly formulated by the AAUP and the Association of American Colleges.[2]

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[1] *E.g., Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 756 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972). *See Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 907 (2d Cir. 1982) ("AAUP policy statements have assisted the courts in the past in resolving a wide range of educational controversies").

[2] The 1940 *Statement of Principles* and the 1958 *Statement on Procedural Standards* are reprinted in AAUP POLICY DOCUMENTS AND REPORTS (3d ed. 1977), at 1-4 and 5-7, respectively.

The AAUP participated as *amicus curiae* in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), the two seminal cases in this Court defining the procedural rights of faculty members at state-supported institutions of higher education. Through its published case reports examining conditions of academic freedom and tenure at American colleges and universities,[3] the AAUP has developed a coherent "common law"[4] of institutional procedure that defines, perhaps more clearly than any other source, the contours of academic due process.

The issues implicated in this case are of direct concern not only to beginning or other teachers holding probationary appointments but to the purposes and objectives of higher education itself. When faculty tenure or other protected status is not present or applicable, it is especially important to assure that academic freedom and related constitutional rights, properly defined and prescribed, are in fact respected through the affordance of due process. The AAUP is concerned about the implications this case may have for education in general and higher education in particular. What was done to Jesse Vail could be done to any member of our profession if due process rights are not respected.

SUMMARY OF ARGUMENT

In *Roth* and *Sindermann*, the Court fashioned a straightforward approach for determining when states are required by the Due Process Clause to provide notice and a hearing in connection with the decision to dismiss an employee. The two cases called for resort to state legislation, contract law, or the employing institution's own personnel practices to discover whether a discharged

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[3] For a description of the AAUP's investigative and mediative roles in American higher education, *see Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1105-12 (1968).

[4] *Cf. Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

state employee had a legitimate claim of entitlement to continued employment. In Point I of our Argument, we argue that the court below applied the rule from *Roth* and *Sindermann* properly. The court found that representations made to Vail at the time he was hired gave rise to an enforceable, mutually engendered expectation of employment for a two-year term. The court concluded that Vail had a constitutionally protected property interest in his employment with the Board of Education, and that the Board of Education violated the Due Process Clause by depriving him of that interest without explaining the reasons for its action or giving Vail the opportunity to contest those reasons at a hearing. The result in this case is consistent with controlling decisions of this Court, and promotes the important objectives of procedural due process as developed in cases before and after *Roth* and *Sindermann*.

In Point II, we examine a pivotal issue that separated the dissenting judge from the other members of the panel in the court below. In our view, the constitutional analysis in *Roth* and *Sindermann* did not turn on the uniqueness of tenure as a "special" form of job entitlement.[3] For purposes of determining whether a property interest is implicated at all, the decisions in *Roth* and *Sindermann* do not exalt tenure over other sources of entitlement. Jesse Vail's property interest in his job was as strong as the interest Robert Sindermann claimed in his, notwithstanding the fact that Vail was a probationary employee while Sindermann claimed the equivalent of a tenured position.

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[3] *Vail v. Board of Education of Paris Union School Dist. No. 95*, 706 F.2d 1435, 1451 (7th Cir. 1983) (Posner, J., dissenting), reprinted in the appendix to the Petition for a Writ of Certiorari [hereinafter "Pet. App."] at App. 31. For the sake of convenience, the opinions of the panel members in the court below will be cited in this brief by parallel references to the official reporter ("706 F.2d at ——") and the appendix to the petition for certiorari ("Pet. App. ——").

While a probationary faculty member may not have a mutually engendered expectation of continued employment beyond the term of his or her appointment, the probationer's legitimate entitlement to serve until the end of the appointment is as strong as the entitlement of tenure for that term. Just as a tenured faculty member cannot be terminated except "for cause" during the indefinite term of a tenured appointment, a probationary faculty member is subject to the same standard—separation only "for cause"—during the term of a probationary appointment. This is specified in the 1940 *Statement of Principles* and constitutes accepted practice in the educational community. The Court's decisions in *Wieman v. Updegraff*, 344 U.S. 183 (1952), and *Connell v. Higginbotham*, 403 U.S. 207 (1971) (per curiam), reflect the fact that probationary faculty members are entitled to the protections of the Due Process Clause during the term of their appointments.

Finally, we turn in Point III to another issue that divided the panel in the court below. In misplaced reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981), Judge Posner argued that the state had in essence provided Vail with an adequate postdeprivation remedy in the form of a cause of action for breach of contract, assertable in a state trial court. We believe that Judge Posner's analysis fails because of an unsupportable predicate—namely, that "the right Vail was allegedly deprived of is just a right to a particular remedy—damages . . . ."[6] To the contrary, Vail was deprived of something more fundamental: the assurance of a fair and impartial hearing. The damages sought and awarded in this case vindicated Vail's *constitutional* right to fair evaluation and treatment, not simply his contractual right to damages for breach. *Parratt* does not hold to the contrary. Nor does *Parratt* permit a postdeprivation remedy under the facts presented in Vail's case. We contend, on the strength of *Logan v.*

[6] 706 F.2d at 1453, Pet. App. 35 (Posner, J., dissenting).

Zimmerman Brush Co., 455 U.S. 422 (1982), and *Parratt* itself, that Vail was entitled to a hearing *before* he was dismissed, and that the Board of Education's failure to provide him with a pretermination hearing violated the Due Process Clause.

ARGUMENT

I. The Court Below Properly Found that Vail Had a Constitutionally Protected Property Interest in Serving Until the Conclusion of his Probationary Appointment.

In *Roth* and *Sindermann*, the Court took a new approach to the analysis of procedural claims under the Due Process Clause.[7] Where government benefits were at issue, the two cases shifted the analytic focus from an independent appraisal of the importance of the claimed benefit, *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970), to the *source* and *nature* of the claim. The Court distinguished in *Roth* between a benefit to which the claimant could assert "a legitimate claim of entitlement" and a benefit for which the claimant had no more than "an abstract need or desire"; only in the former instance did the claim rise to the level of a constitutionally cognizable "property" interest. 408 U.S. at 577.

In *Roth* and *Sindermann*, the Court looked in the first instance to state law to determine whether a legitimate claim of entitlement existed to the continued enjoyment of a government benefit. Property interests, the Court ruled in *Roth*, "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* The question in *Sindermann* was whether the claimant's lack of a contractual or tenure right to reemployment defeated his due process claim. The Court observed:

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[7] For the convenience of the Court, we attach as an addendum to this brief a selected list of recent scholarly writing bearing on the *Roth* and *Sindermann* decisions.

> We hold that it does not. . . . [The] absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment.

408 U.S. at 596, 601.

In *Roth*, the Court found that a teacher who was not reappointed at the end of a one-year employment contract had no entitlement to continue as a member of the faculty. The teacher in *Sindermann*, however, was given an opportunity to prove his claim that he was entitled to continued employment in the absence of demonstrated cause for dismissal. "Such proof," the Court held, "would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603.

Roth and *Sindermann* look to interests grounded in state law as the primary source of the property-entitlement claim. But federal courts, especially in actions brought under 42 U.S.C. § 1983, determine whether the interests are the kind of property (or, in an appropriate case, the kind of liberty) protected by the Due Process Clause, and, if so, the extent of the process "due" under the circumstances. *See Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978).

The *Roth-Sindermann* doctrine requires courts to look first to the law and practices of the employing state in order to determine whether the complainant has an enforceable property interest in the benefit claimed. In most instances, as the Court has suggested in a related context, "[t]he outcome of that inquiry is clear. . . ." *Memphis Light, Gas & Water Division v. Craft, supra*, 436 U.S. at 9. When the state law issue has not been definitively decided, this Court ordinarily defers to the construction of state law adopted by the lower federal courts in the forum state, particularly when the lower

trial and appellate courts have reached a consistent conclusion. *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976); *see also* cases cited in *id.* at 346 n.10.

In this case, the court below applied *Roth* and *Sindermann* and properly concluded that Vail had a constitutionally protected property interest in his job. The court examined the provisions of the Illinois School Code, Ill. Rev. Stat. ch. 122 (1981), and concluded that the Board of Education's oral promise to renew Vail's appointment for a second year constituted an enforceable contractual obligation under Illinois law that was not prohibited by the School Code. The court also found that, even if no enforceable contract existed, the Board of Education's representations to Vail created a mutual expectation of continued employment sufficient under *Roth* and *Sindermann* to create a property right protected by the Due Process Clause.

The petitioners acknowledge that the Illinois Supreme Court has not conclusively resolved the question whether under state law a probationary faculty member can receive a two-year appointment.[8] Under the circumstances, the construction of state law adopted by the District Court and Seventh Circuit—that Illinois law does not expressly prohibit two-year appointments—is entitled to deference in this Court.

Even if the construction of state law adopted by the lower courts were faulty and the Illinois School Code prohibited two-year probationary appointments, that fact would not necessarily alter the constitutional conclusion that Vail had a protected property interest in a second year of employment. The "absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment," said the Court in *Sindermann*; a property interest can also be created by "mutually explicit understandings"

[8] "[T]he Illinois Supreme Court has yet to rule on the legality of a two-year probationary contract. . . ." **Brief for Petitioners 18.**

that support a claim of entitlement to a government benefit. 408 U.S. at 601. The Board of Education promised Vail that his appointment would be renewed automatically for a second year. That was an important inducement for Vail, because it would have assured him an opportunity to be considered for tenure. As the court below correctly observed, Vail was entitled to rely on the Board's promise even if the promise was one the Board could not or should not have made.

The commandment in *Roth* and *Sindermann* to look to state law does not mean that state law controls *absolutely* the determination of constitutional property interests. Judge Posner himself made this point in *Reed v. Village of Shorewood*, 704 F.2d 942 (7th Cir. 1983), a case decided less than a month before *Vail*. In *Reed*, the owners of a bar complained that city officials deprived them of their liquor license without a hearing by waging a campaign of harassment and intimidation that succeeded in forcing the plaintiffs to go out of business. The officials argued that the plaintiffs had no property interest in their license because the Illinois Liquor Control Act specifically recited that a liquor license was "a personal privilege" that did "not constitute property." 704 F.2d at 948.

"[T]he conclusion may seem inescapable," Judge Posner wrote, "that these plaintiffs had no Fourteenth Amendment property right in their liquor license. But it is not. . . . 'Property' in the Illinois Liquor Control Act need not mean the same thing as 'property' in the due process clause." *Id.* He went on to conclude that the plaintiffs had a protected property interest in their liquor license notwithstanding the language of state law, and were entitled to offer evidence at trial that city officials violated the Due Process Clause by, in effect, depriving the plaintiffs of their license without providing "all the protections, procedural and substantive, of the revocation process." *Id.* at 949.

Reed stands for the proposition that state law is not the *sole* source of property rights protected by the Due Process Clause. Whether "property" has vested in a particular case is, ultimately, a federal question, principally *but not conclusively* to be resolved by reference to state law. If, in Vail's case, the Illinois School Code did not permit two-year appointments for probationary faculty members, Vail would still be within his rights to rely on official representations by the Board of Education as an independent source of entitlement to a two-year probationary appointment.

In sum, the court below was correct to make *Roth* and *Sindermann* its analytic point of departure. As required by those cases, the court looked to see whether actions by the Board of Education had fostered a mutually explicit understanding that Vail would be entitled to serve for a second probationary year. The court concluded that Vail had a legitimate claim of entitlement to employment for a second year. The ruling was correct and should be affirmed by this Court.

II. The Due Process Clause Protects a Teacher from Dismissal Without a Hearing During the Term of a Probationary Appointment.

In his dissenting opinion in the court below, Judge Posner sought to limit the holding in *Sindermann* by distinguishing between the *tenure* right asserted by the plaintiff in that case and the *contract* right claimed by Jesse Vail here. Judge Posner argued that tenure was a "special" right because of its "indefinite duration," in contrast to a probationer's "mere contract right" to a specific term of employment. 706 F.2d at 1451, Pet. App. 31, 32.

Judge Posner's distinction is not warranted by the decisions of this Court and other federal courts or by sound educational practice. A probationary faculty member enjoys precisely the same expectation of continued employ-

ment *during the term of his or her appointment* as a tenured faculty member during the longer term of employment normally associated with tenured status.

A.

Judge Eschbach aptly indicates that Judge Posner's interpretation of *Sindermann* "finds no support in the Supreme Court's opinion" in that case. 706 F.2d at 1444, Pet. App. 17 (Eschbach, J., concurring). In fact, Judge Posner's views cannot be squared with *Roth*'s reliance on earlier cases specifically recognizing the due process rights of probationary faculty members. The Court cited *Wieman v. Updegraff*, 344 U.S. 183 (1952), for the proposition that "college professors and staff members dismissed *during the terms of their contracts* have interests in continued employment that are safeguarded by due process." *Roth*, 408 U.S. at 576-77 (emphasis added; citation omitted). From *Connell v. Higginbotham*, 403 U.S. 207 (1971) (per curiam), the Court derived an even more pertinent rule: a teacher "recently hired *without tenure* or a formal contract, but nonetheless with a clearly implied promise of continued employment," could not be dismissed without the hearing "required by due process." *Id.* (quoting in part from *Connell, supra*, 403 U.S. at 208) (emphasis added).

The court below correctly adduced its own precedent in *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973) [*Hostrop I*],[9] holding that the termination of a college president in the first year of a two-year contract deprived him of a constitutionally protected property interest in continued employment. Notwithstanding the fact that the president had no right of tenure in his position, the court, citing *Sindermann* and *Roth*, held that a

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[9] *On remand*, 399 F. Supp. 609 (N.D. Ill. 1974), *aff'd in part and rev'd in part*, 523 F.2d 569 (7th Cir. 1975) [*Hostrop II*], *cert. denied*, 425 U.S. 963 (1976).

term of employment set by contract created a property interest in continued employment that the state could not extinguish without conforming to the dictates of procedural due process. 471 F.2d at 494.

To be sure, matters are different when a probationer's term contract *expires*. Lower courts, following *Roth*, recognize that a probationer ordinarily has no enforceable expectation of renewal from one contract term to the next during the probationary period. *E.g., Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981). The case law, however, clearly reflects the difference between appointments not renewed and appointments terminated prematurely; when terminations occur during the term of an appointment, courts enforce the constitutional right to some form of hearing. "Simply because one may not be entitled to indefinite employment does not mean he has no property interest in his job *during* the term he does enjoy." *Colm v. Vance*, 567 F.2d 1125, 1129 n.3 (D.C. Cir. 1977) (emphasis in original). *See also Bruce v. Board of Regents for Northwest Missouri State University*, 414 F. Supp. 559 (W.D. Mo. 1976); *Bates v. Hinds*, 334 F. Supp. 528 (N.D. Tex. 1971).

B.

A defined period of probationary service is an essential element in many systems of employment, and is virtually universal in American education at all levels. Because of the major obligation an institution assumes by making a tenured appointment, the tenure system presupposes a period of probationary service during which the probationer is expected to satisfy employer and peers that he or she is qualified for and deserving of the special protections associated with tenured status. In the words of the Commission on Academic Tenure in Higher Education, "[t]he tenure system depends in a fundamental way on the effectiveness of the probationary period—in helping the younger faculty member to develop his abilities

as teacher and scholar and in conducing to reliable judgment about his future growth and contribution to the institution." [10]

The 1940 *Statement of Principles on Academic Freedom and Tenure*, promulgated by the AAUP and the Association of American Colleges, is the paradigmatic expression of academic tenure in American higher education.[11] The 1940 *Statement of Principles* explicitly envisions a probationary period of not more than seven years for all teachers and scholars. During the probationary period, a probationer has the same academic freedom possessed by any other member of the faculty regardless of length of service. Since the satisfactory completion of a probationary period is a prerequisite to the conferral of tenure, the teacher whose probationary appointment is prematurely terminated suffers a deprivation that is different only in degree from the wrongful termination of a tenured appointment.

Dismissal during the term of probationary service denies the faculty member a fundamental prerogative of the practice of the academic profession: the "right of

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[10] COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE: REPORT AND RECOMMENDATIONS 62 (1973).

[11] The 1940 *Statement of Principles* is reprinted in AAUP POLICY DOCUMENTS AND REPORTS 1-4 (3d ed. 1977). As one court had noted, the 1940 *Statement of Principles* embodies "widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards." *Browzin v. Catholic University of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975). See also Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150-51 (1980) (observing that the 1940 *Statement of Principles* "has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession").

access to his students." [12] Because it happens so infrequently, dismissal during the term of a probationary appointment causes serious injury to the reputation of a young scholar. As an AAUP committee reported on one such occasion:

> To remove a professor from his classroom and other academic duties during the academic year for which he has been appointed seems certain to cast grave suspicions upon his character or competence in the minds of those who might employ him in the future, suspicions which might not arise if the teacher were refused appointment after adequate notice.[13]

The inhibiting effect of termination during a term appointment, moreover, transcends the individual faculty member involved. In the absence of a requirement of notice and an opportunity to be heard, all probationary faculty members would labor under the disquieting risk of summary dismissal, the personal consequences of which could not be fully remedied in a proceeding for breach of contract. Academic freedom for all faculty members would be severely jeopardized under such a regime.

The teaching profession, in sum, recognizes the grave consequences that inevitably attend the dismissal of a probationary faculty member like Jesse Vail [14] during the

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[12] *Academic Freedom and Tenure: Adelphi University*, 53 AAUP BULL. 278, 285 (1967). *Cf. Academic Freedom and Tenure: St. John's University (New York)*, 52 AAUP BULL. 12, 16 (1966).

In this and the succeeding footnote, we cite to the reports of AAUP investigating committees which appear in the AAUP BULLETIN. These reports are "noted for their thoroughness and scrupulous care." *Browzin v. Catholic Univ. of America*, 527 F.2d 843, 848 n.8 (D.C. Cir. 1975).

[13] *Academic Freedom and Tenure: Wisconsin State University—Whitewater*, 54 AAUP BULL. 25, 27 (1968).

[14] In his dissent, Judge Posner draws a distinction between a "teacher" and an "athletic coach." 706 F.2d at 1451, Pet. App. 32. He observes that Jesse Vail was the latter—the unspoken assump-

course of a term appointment. In this context, educational policy converges with constitutional principles recognized in *Wieman v. Updegraff*, *Connell v. Higginbotham*, and *Roth* itself.

III. A Postdeprivation Remedy in the Form of a Common Law Action for Breach of Contract is Not Sufficient to Vindicate the Federal Interest in Ensuring that Due Process is Observed.

Jesse Vail brought this action against his employer under 42 U.S.C. § 1983. While an action under that statute may resemble a tort or contract claim arising under state law, it nevertheless serves a different and more crucial purpose.

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tion being that Vail could not simultaneously be characterized as the former and could not claim the constitutional and statutory protections associated with teaching status.

Judge Posner's approach prompts us to make two brief comments. First, the Illinois School Code does not distinguish between teachers and coaches; for purposes of qualifying for tenure under Illinois law, Vail was a "teacher" within the meaning of that term in the Code.

Second, Judge Posner is clearly mistaken in assuming that academic freedom is a right that can be asserted only by faculty members in *higher* education. See *Russo v. Central Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Albaum v. Carey*, 283 F. Supp. 3 (E.D.N.Y. 1968); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1112-13 (1968).

It is contrary to the animating spirit of academic freedom to accord *more* procedural protection to one set of teachers than another because one is more intimately involved in the discovery and dissemination of knowledge. It may be generally true that the secondary school faculty member engaged in routine instruction is at one end of a continuum and the learned scientist or philosopher who labors every day on the frontier of advanced knowledge is at the other. But this progression does not vitiate the need for due process at all levels; if anything, it argues in favor of it. One of the most celebrated academic freedom cases of all time, a case cited by Judge Posner in his dissent—*Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927)—involved a public high school teacher. In our view, the protections of procedural due process must be applicable to all faculty members if academic freedom for all is to be protected.

We argue below that Judge Posner was fundamentally incorrect in asserting that "[t]here is no federal interest in this case. . . ." [15] Jesse Vail sued because procedural rights guaranteed by the Constitution—rights wholly separate from employment rights created by operation of state law—were trammeled when he was discharged from his job without a hearing. As to the suggestion in Judge Posner's dissent that Vail had an adequate remedy in the form of a contract claim in state court, that remedy could be pursued only *after* the Board of Education deprived Vail of his property interest in continued employment. It is clear from recent decisions of this Court that a postdeprivation remedy is not constitutionally adequate under the circumstances presented here.

A.

While there is substantial interplay between the common law of the forum state and Section 1983, the Court stated in *Monroe v. Pape*, 365 U.S. 167 (1961), that the causes of action under state and federal law are not identical and vindicate entirely different substantive rights. "The federal remedy," observed the Court, "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183. In his concurring opinion, Justice Harlan attributed to the Congress that enacted Section 1983

> the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. [*Id.* at 196.] [16]

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[15] 706 F.2d at 1449, Pet. App. 28.

[16] *Accord, Carey v. Piphus*, 435 U.S. 247, 258 (1978). *Cf. Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978) ("[a]lthough the underlying substantive interest is created by 'an

Jesse Vail suffered two separate wrongs. His employment contract was breached, giving rise to an action for damages; and he was not given an opportunity to contest the state's decision to fire him before that decision was put into effect, giving rise to an action under Section 1983. Although the wrongs may have been related, they created two distinct causes of action:

> A civil rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The civil rights action based on deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which the contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and a hearing.

Hostrop I, *supra*, 471 F.2d at 494 n.15.[17]

Not only are constitutional and contractual causes of action distinct, but different remedies may be appropriate in each context. Declaratory and injunctive relief, which may not be available to litigants in a state court

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independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause") (quoting *Roth*, 408 U.S. at 577, and *Sindermann*, 408 U.S. at 602).

[17] This is precisely what came to pass in *Hostrop II*, a case not discussed by the court below (perhaps because Judge Posner concentrated his fire on *Hostrop I*). When the cause was remanded for trial after *Hostrop I*, the trial court found that the plaintiff's dismissal was fully justified by his conduct during his term as president; the Seventh Circuit nevertheless held that he was entitled to damages on the *separate* ground that he had been deprived of his constitutional right to notice and a hearing. *Hostrop II*, 523 F.2d at 579.

action for breach of contract, can be asserted by the complainant in an action under Section 1983. In Vail's case, as it happens, the trial court denied the plaintiff's application for reinstatement and awarded him damages for breach of contract *and deprivation of constitutional rights* that looked very much like the award Vail would have received in state court had he sued in contract alone. However, the mere fact that the trial court in its discretion fashioned a remedy resembling the one available in state court does not mean that state and federal causes of action are identical, as Judge Posner appears to suggest. Justice Harlan may have anticipated this very suggestion when he wrote in *Monroe* that when the state remedy is "fully appropriate to redress those injuries against which the Constitution provides protection," it is a matter of "the purest coincidence." 365 U.S. at 196 n.5 (Harlan, J., concurring).[18]

B.

Relying on his view of *Parratt v. Taylor*, 451 U.S. 527 (1981), Judge Posner argues that, assuming Vail had a constitutionally protected property interest in serving as football coach until the expiration of his term, the state nevertheless provided him with all the process he was "due" in the form of a post-termination action for breach of contract assertable in state court.[19]

According to *Parratt*, the many decisions of this Court dealing with the constitutionality of postdeprivation remedies reduce to a straightforward rule:

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[18] *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 20 (1980).

[19] *Parratt* lends itself to a variety of interpretations because of the extent to which the Court's opinion is qualified by the concurring opinions. *See Note, Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CALIF. L. REV. 253 (1983).

> These cases recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process. [451 U.S. at 539.]

In *Parratt*, an inmate brought an action under Section 1983 against the prison officials who were allegedly responsible for losing a mail-order hobby kit before it could be delivered to the plaintiff. The Court observed that it was "not only impracticable, but impossible" to provide a meaningful hearing before the hobby kit disappeared, since the state could not "predict precisely when the loss [would] occur," *id.* at 541, or even that it would occur at all. *Parratt* rested on the fact that the actions of culpable state officials were "random and unauthorized." 451 U.S. at 541. This made it literally impossible for the state to provide a hearing in advance of an occurrence it could not anticipate.

Matters are different, however, when the property interest at stake is an entitlement to continued employment, an entitlement that cannot be extinguished except by a deliberate act. Justice Blackmun (joined by Justice White), concurring in *Parratt*, expressed the logical corollary to the holding in that case:

> While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," [451 U.S.] at 541, it is rare that the same can be said of intentional acts by state employees. *When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials*, it should be required, as a matter of due process, to do so. [451 U.S. at 546; emphasis added.]

One year later, Justice Blackmun applied the corollary to the different facts in *Logan v. Zimmerman Brush Co.*,

455 U.S. 422 (1982). There, a probationary employee who was fired during his first month of employment was deprived of a hearing before the Illinois Fair Employment Practices Commission because of the Commission's own failure to convene a fact-finding conference within the jurisdictional time limit imposed by state statute. The employer, pointing to the existence of common-law tort remedies provided under state law, argued that these postdeprivation remedies were adequate under *Parratt* to satisfy the requirements of due process. The Court disagreed:

> This argument misses *Parratt*'s point. In *Parratt*, the Court emphasized that it was dealing with "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure." 451 U.S., at 541. Here, in contrast, it is the state system itself that destroys a complainant's property interest . . . . Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards. [455 U.S. at 435-36.]

Parratt rested ultimately on the practical conclusion that the state could not have held a predeprivation hearing even if it wanted to, given the "random" nature of the deprivation suffered by the inmate in that case. In *Logan*, on the other hand, it was not a practical impossibility to hold a hearing on the plaintiff's claim before the plaintiff lost his job. For that reason, the Court held in *Logan* that a postdeprivation remedy in the form of a right of action in state court was constitutionally inadequate.

Here as well, no practical impediment prevented the Board of Education from affording Vail the opportunity for some kind of a hearing prior to his dismissal. There was nothing "random" or unpredictable about the Board's conduct, as there was in *Parratt*. Under the circum-

stances, the Board violated Vail's constitutional rights by providing him only with a postdeprivation remedy—and one of questionable value at that[20]—when it could have provided a hearing before Vail lost his job.

C.

Judge Posner is concerned that, by recognizing Vail's property interest in the terms of his employment agreement with the state, the court invites *anybody* who contracts with the state—even the proverbial "supplier of paper clips"—to assert the equivalent of a breach-of-contract claim in federal court. This result, he asserts, would be "contrary to every principle of federalism" and would risk the "trivialization" of the Due Process Clause. 706 F.2d at 1449, 1456, Pet. App. 28, 42.

Judge Posner confuses two analytically distinct steps in due process cases. The Court has distinguished in recent years between the threshold *Roth-Sindermann* inquiry (is there a "property" interest to begin with?) and the subsequent procedural inquiry (in extinguishing that right, did the state provide the "process" that was "due"?). Government conduct is actionable under the Due Process Clause only if it involves a deprivation of property *and* the absence of "due" process.[21] The issue in *Parratt* was not whether a property interest existed—it concededly did, 451 U.S. at 529 n.1—but whether the process provided by the state was constitutionally adequate.

This determination rests in part on "the importance of the private interest" at stake. *Logan*, *supra*, 455 U.S. at 434. An interest in "retaining . . . employment" is a substantial interest. *Id.* It is considerably more substantial than the interest of an inmate in his hobby kit or

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[20] *Logan*, *supra*, 455 U.S. at 436-37 (describing a common law action in state court as a "lengthy and speculative process, which . . . . will never make the complainant entirely whole").

[21] *Memphis Light*, *supra*; *Goss v. Lopez*, 419 U.S. 565 (1975).

the pecuniary interest of a paper clip supplier in the specific performance of a sales contract. A predeprivation hearing may be constitutionally compelled in a case involving the right to continued employment. But the same right did not belong to the inmate in *Parratt*, and there is no reason why the same procedural right would necessarily belong to the paper clip supplier. The paper clip supplier may have a constitutionally protected interest in seeing that the state does not act arbitrarily or illegally in meeting its contractual obligations. But that does not mean that the paper clip supplier may insist on the same procedural rights under the Due Process Clause that Vail must receive in accordance with the judgment below.

In short, we are not as alarmed as Judge Posner appears to be that, by recognizing a property interest in Jesse Vail's case, the Seventh Circuit may be creating property interests for others who execute contracts of a different sort with the state. The existence of a property interest is not the whole story in due process cases; one who possesses a property interest is still not entitled to relief in an action under 42 U.S.C. § 1983 unless he can show that state-provided process is inadequate under the particular circumstances of his case. Others possessing property interests of a different kind will not inevitably be able to make that showing simply because Vail succeeded here.

CONCLUSION

Jesse Vail's plight raises concerns that transcend his own situation. The principles underlying the decision of the court below are important because of their direct relationship to academic freedom, a cherished constitutional right. The decision, therefore, is of direct consequence to all teachers—"in our entire educational system, from the primary grades to the university" [22]—who are dedicated to the pursuit of truth and its free exposition.

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[22] *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

We do not know why Jesse Vail was dismissed after his first year of service. Vail may not know either. We do know, however, that as a faculty member at a state-supported school Vail could not be fired for reasons violative of his First Amendment rights. A pretermination hearing assures Vail and his colleagues that, if impermissible considerations violative of his academic freedom influenced the board's decision to fire him, he would have an opportunity to bring that fact to light. The right to a hearing, by itself, serves substantially to check any impulse a school board member may have to base teacher employment decisions on considerations not tolerated by the First Amendment.

If a probationary faculty member can be summarily dismissed during the term of an appointment, then the academic freedom of teachers everywhere is vulnerable. For these reasons, and on the strength of *Roth* and *Sindermann*, the AAUP urges the Court to affirm the judgment of the court below.

Respectfully submitted,

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ADDENDUM

A SELECTION OF RECENT SCHOLARLY WRITING BEARING ON PUBLIC EMPLOYMENT AND DUE PROCESS

The contributions listed here may be instructive to the Court, as they were to the writers of this brief. Their authors would not necessarily agree with the classifications to which we have assigned them, any more than, even within a given classification, they agree with one another.

A. Generally Accepting the Approach of *Roth* and *Sindermann*

Finkin, *Toward a Law of Academic Status*, 22 BUFF. L. REV. 575 (1973)

Gray, *Procedural Fairness and Substantive Rights*, in DUE PROCESS (Pennock and Chapman ed.), NOMOS XVIII 82 (1977)

Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146 (1983)

B. Taking a Position that *Roth* and *Sindermann* Fall Short of Yielding Due Process

Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 SO. CALIF. L. REV. 355 (1978)

Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875 (1982)

Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 BOSTON U. L. REV 885 (1981)

Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS

(Pennick and Chapman ed.), NOMOS XVIII 126 (1977)

Monaghan, *Of "Liberty" and "Property"*, 62 CORN. L. REV. 401 (1977)

Rabin, *Job Security and Due Process: Monitoring Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976)

Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978)

Terrell, *"Property", "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L. J. 861 (1982)

Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261

TRIBE, AMERICAN CONSTITUTIONAL LAW 501-563 (1978)

Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORN. L. REV. 445 (1977)

C. Taking a Position that *Roth* and *Sindermann* Afford More Process Than is Due

Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85

Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942 (1976)

Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEG. STUD. 3 (1983)